

FILED \_\_\_\_\_ LODGED \_\_\_\_\_  
RECEIVED \_\_\_\_\_ COPY \_\_\_\_\_  
APR 24 2001  
CLERK U S DISTRICT COURT  
DISTRICT OF ARIZONA  
DEPUTY

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Donald D. Bailey,  
Plaintiff,

vs.

United States of America,  
Defendant.

No. 95 CV 267 TUC-ACM

**ORDER**

In 1995, the Internal Revenue Service ("IRS") assessed a tax penalty against the Plaintiff for knowingly aiding or assisting in the preparation or presentation of a tax return which resulted in an understatement of a tax liability. On May 1, 1995, Plaintiff filed a civil action in Federal District Court seeking a return of the civil penalties. On April 11, 1996, District Judge Richard Bilby entered judgment against the Plaintiff but reduced the penalty from \$10,000 to \$1000. Bailey v. United States, 927 F.Supp 1274, 12 79 (D.C.Ariz. 1996). On July 9, 1997, the Ninth Circuit Court of Appeals affirmed the lower court's decision. Bailey v. United States, 117 F.3d 1424 (9<sup>th</sup> Cir.1997). Most recently, on August 23, 2000, Plaintiff filed a Motion to Set Aside Judgment based on Fraud.

Rule 60(b)(3) of the Federal Rules of Civil Procedure allows the court to relieve a party from judgment for fraud so long as the motion is "made within a reasonable time . . . and not more than one year after the judgment, order, or proceeding was entered or taken."

Here, Plaintiff filed his Rule 60(b) Motion more than four years and four months after Judge Bilby first entered judgment against him and more than three years and one

1 month after the Ninth Circuit affirmed Judge Bilby's Order. Without question, Plaintiff's  
2 Motion is untimely under Rule 60(b). This is an absolute bar to relief from the judgment.  
3 U.S. v. Marin, 720 F.2d 229, 231 (1st Cir.1983).

4 To the extent that Plaintiff's action is a *new* complaint for damages, Plaintiff has  
5 already pursued "an independent action to ... set aside a judgment for fraud upon the court"  
6 under the savings clause of Rule 60(b). Plaintiff lost that action and cannot now relitigate  
7 the same or similar issues. Baily v. Internal Revenue Service, 188 F.R.D. 346, 350  
8 (D.C.Ariz. 1999) ("Under *res judicata*, a final judgment on the merits of an action precludes  
9 the parties or their privies from relitigating issues that were or *could have been raised* in that  
10 action."), aff'd 232 F.3d 893 (9<sup>th</sup> Cir. 2000).

11 Accordingly,

12 **IT IS ORDERED** that Plaintiff's Motion to Set Aside Judgment based on Fraud  
13 (Document 42) is DENIED.

14  
15 DATED this 23<sup>rd</sup> day of April, 2001.

16  
17  
18   
19 HONORABLE ALFREDO C. MARQUEZ  
20 SENIOR UNITED STATES DISTRICT JUDGE  
21  
22  
23  
24  
25  
26  
27  
28